92-162

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

INTERNATIONAL INSURANCE COMPANY,

Petitioner,

v.

BRIDGESTONE/FIRESTONE, INC., FMC CORPORATION, MONSANTO COMPANY, REICHHOLD LIMITED, STAUFFER CHEMICAL COMPANY, BECKMAN INSTRUMENTS, INC., SMITHKLINE BECKMAN,

Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Federal Rule of Civil Procedure 24(b)(2), a trial convenience device, allow intervention by a non-party seeking modification of a protective order rather than adjudication of a claim or defense?

2. Is the Ninth Circuit's determination that Rule 24(b)(2) allows permissive intervention to a party not seeking to litigate a claim or defense in conflict with the decisions of this Court requiring that the Federal Rules of Civil Procedure be given their plain meaning?

3. Is the Ninth Circuit's determination that respondents were not required to demonstrate the existence of an independent basis for federal jurisdiction in conflict with decisions of the First, Third, Fifth, Seventh and Eighth Circuits that permissive intervention must be supported by an independent basis for federal jurisdiction?

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PETITION FOR WRIT OF CERTIORARI

Petitioner International Insurance Company ("International")[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on June 4, 1992.

[1] International Insurance Company's corporate parent is Crum and Forster, Inc., a subsidiary of Xerox Financial Services, Inc., which is a subsidiary of Xerox Corporation. International Insurance Company's nonwholly owned subsidiaries are Premier Insurance Co., Seaboard Underwriters, Inc., and Seaboard Underwriters Agency, Inc.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported. A copy of the Ninth Circuit's opinion appears as Appendix A. Copies of the orders of the United States District Court for the Central District of California appear as Appendices B and C.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed an opinion and entered judgment in this case on June 4, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

This case involves Federal Rules of Civil Procedure 24 and 82. The pertinent provisions of the Rules are set forth below. Their complete text is set forth in Appendix D.

Rule 24. Intervention

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

STATEMENT OF THE CASE

In 1988, Beckman Instruments, Inc.,[2] SmithKline Beckman (collectively, "Beckman"), and International settled, and the United States District Court for the Central District of California dismissed, an insurance coverage lawsuit that had been filed in 1985. While the lawsuit was pending, no other litigants sought to participate in coordinated discovery, or to obtain any discovery materials generated by the parties, and no one sought to intervene to assert claims or defenses similar to those of the parties. In April 1990, respondents Bridgestone/Firestone, Inc., FMC Corporation, Monsanto Company, Reichhold Limited and Stauffer Chemical Company filed a motion in the district court under Federal Rule of Civil Procedure 24(b)(2) for what they called leave to intervene. Respondents did not seek to litigate a claim or defense of their own in the settled lawsuit, however. Instead, they sought to "intervene" for the "sole and restricted purpose" of obtaining relief from the Stipulated Discovery Management and Protective Order entered by the district court in 1986. Excerpts of Record ("ER") 33. Respondents did not claim a right to seek modification of the order without intervention, and Rule 24(b) was the only authority offered to justify the proposed intervention.

International opposed respondents' motion by arguing that the proposed intervention was not allowed by Rule 24, and that the proposed intervenors had not satisfied the requirements of Rule 24(b) and (c). Under the decisions of this Court, the Federal Rules of Civil Procedure are to be given their plain meaning. International explained that Rule 24 allows intervention only to those seeking to litigate a claim or defense, and that the Rule contains no language permitting intervention for any purpose other than the litigation of a claim or defense.

Respondents did not challenge International's assertion on this basic issue. Rather than point to language in the Rule authorizing what they proposed, respondents contended that most of the requirements of Rule 24 should not be applied to their motion. Respondents

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[2] As a result of an error in the caption submitted by respondents in the district court, the Court of Appeals' opinion refers to "Beckman Industries, Inc." rather than "Beckman Instruments, Inc."

asserted that it was unnecessary for them to demonstrate compliance with all of the requirements of Rule 24 because they did not seek to litigate a claim or defense.

Respondents based their motion on a series of cases, discussed below, that had allowed similar relief with virtually no discussion of the requirements and limitations of Rule 24. Although they cited cases allowing limited purpose intervention, respondents never contended that any court had ever held that limited purpose intervention can be reconciled with the language of Rule 24.

International also argued that respondents' motion should be denied because respondents failed to demonstrate the existence of an independent basis for federal subject matter jurisdiction. Although the district court had diversity jurisdiction over the dispute between the original parties under 28 U.S.C. § 1332, respondents made no attempt to demonstrate the existence of an independent jurisdictional basis for intervention. Every Court of Appeals to address the issue had concluded that permissive intervention under Rule 24(b) must be supported by an independent basis for federal jurisdiction. Respondents argued that no independent jurisdictional basis need be established because the district court had ancillary jurisdiction and also because they did not seek to litigate a claim or defense.

Respondents' motion was heard on June 4, 1990. The district court's orders granting the motion were filed on June 29, 1990, and entered on July 3, 1990. See Apps. B, C. The court's orders generally recited that certain of the requirements of Rule 24 were satisfied, but it made no findings on some of the key issues raised by International. International lodged a timely notice of appeal on July 2, 1990. *See* Fed. R. App. P. 4(a)(2).

In the Court of Appeals, International again relied on the plain meaning of Rule 24 and the cases requiring an independent basis for federal jurisdiction before permissive intervention may be had. Respondents again failed to offer any textual support for limited purpose intervention, and they continued to argue that most of the requirements of Rule 24 did not apply even though Rule 24 contains no exceptions. On June 4, 1992, the Ninth Circuit filed an opinion affirming the district court's orders granting the motion for leave to intervene. *Beckman Indus., Inc.* v. *Int'l Ins. Co.*, ___ F.2d ___ (9th

Cir. 1992). See App. A. As discussed in greater detail below, the Court of Appeals concluded that Rule 24(b) allows limited purpose intervention, but the Court did not explain its conclusion by reference to the language of Rule 24. The Court merely referred to the earlier decisions by other courts addressing limited purpose intervention. As explained below, none of those cases considered the arguments presented here, and none identified any basis in the language of Rule 24 for a conclusion that intervention is available to a party who does not seek to litigate a claim or defense.

REASONS FOR GRANTING THE WRIT

The decision by the Court of Appeals in this case is one in a series of cases that have allowed a procedure that is called "intervention" but is plainly not allowed by the unambiguous terms of Federal Rule of Civil Procedure 24(b) and cannot be squared in any way with the language or purpose of the Rule. The Ninth Circuit's decision is an unmistakably incorrect application of Rule 24 and is in direct conflict with the decisions of this Court that command that the Federal Rules be given their plain meaning. The court's decision is so far removed from a proper construction of Rule 24 that the court neither mentioned the plain meaning rule argued by International nor made any attempt to explain how any language in Rule 24 could possibly be construed in a manner that would allow limited purpose intervention. Certiorari should be granted to resolve the conflict between the decision below (and those it followed) and the cases decided by this Court that require that the Federal Rules be given their plain meaning.

Certiorari is also appropriate because the Ninth Circuit created in this case an exception to a unanimous requirement in the Courts of Appeals that have addressed the issue that a party seeking permissive intervention must establish an independent basis for federal jurisdiction. If what respondents proposed is to be considered Rule 24 permissive intervention, it must be governed by all of the requirements that apply to intervention.

I.

THE NINTH CIRCUIT'S OPINION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND IS INCONSISTENT WITH THE LANGUAGE AND PURPOSE OF FEDERAL RULE OF CIVIL PROCEDURE 24(b).

The most basic canon of construction is that the words of a statute or rule provide its meaning. *Connecticut Nat'l Bank* v. *Germain*, ___ U.S. ___, 112 S. Ct. 1146, 1149 (1992). In this case, and in the cases followed by the Ninth Circuit, this fundamental principle has been lost. Limited purpose intervention, a procedure that is not mentioned or suggested in Rule 24, has been permitted with no attempt to justify it by reference to the language of Rule 24. The Ninth Circuit's recognition of limited purpose intervention is in conflict with the decisions of this Court requiring that the Federal Rules be given their plain meaning, in conflict with the decisions of several district courts that reject attempts at "intervention" not permitted by the language of Rule 24, and entirely unsupported by the language and purpose of the Rule.

A. The Ninth Circuit's Application Of Rule 24(b) Cannot Be Reconciled With This Court's Mandate That The Federal Rules Be Given Their Plain Meaning.

This Court has repeatedly held that "[w]e give the Federal Rules of Civil Procedure their plain meaning, and generally with them as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete'." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) (citations omitted). *See also Connecticut Nat'l Bank* v. *Germain*, ___ U.S. ___, 112 S. Ct. 1146, 1149 (1992) (statutory construction); *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, ___ U.S. ___, 111 S. Ct. 922, 928 (1991); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 2453 (1990). To resolve the issues about the scope of Rule 24(b), the Ninth Circuit should have begun its inquiry with a determination of whether the language of the Rule allows "intervention" to one who does not seek to litigate a claim or defense. *See Ardestani* v. *INS*, ___ U.S. ___, 112 S. Ct. 515, 519

(1991). Because the Rule is unambiguous, the court's inquiry should have been completed with a conclusion that the district court's orders should be reversed. Rather than be guided by the principles of construction established by this Court, however, the Ninth Circuit based its decision on prior cases in which the courts had not even considered the issues presented here.

Respondents never argued, and the Ninth Circuit did not hold, that there is any language in Rule 24 that can be construed in a manner that would justify affirmance of the district court's orders. There is no room for dispute on the point. Rule 24(b)(2) allows intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Under Rule 24(c), a party desiring to intervene is required to file a motion to intervene, which motion "shall" be accompanied by a pleading setting forth the proposed intervenor's claim or defense. There is no doubt that the required pleading is a complaint or answer, or other initiating or responsive pleading, *see* Fed. R. Civ. P. 7(a), (b), and there is no doubt that the claim or defense is a request for relief or denial of relief on the merits. Fed. R. Civ. P. 8(a), (b).

Justice O'Connor explained the relationship between the pleading requirement and the reference to a claim or defense in her concurring opinion in *Diamond* v. *Charles*.

> The words "claim or defense" manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit, as is confirmed by Rule 24(c)'s requirement that a person desiring to intervene serve a motion stating "the grounds therefor" and "accompanied by a pleading setting forth the claim or defense for which intervention is sought."

476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring in part and concurring in the judgment).[3] There is nothing in Rule 24 that

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[3] Respondents have attempted at times to portray International's argument as a purely formalistic procedural technicality based on the pleading requirement of Rule 24(c). As shown by Justice O'Connor's observations in *Diamond*

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recognizes or permits the assertion of anything but "the kind[ ] of claim[ ] or defense[ ] that can be raised in courts of law as part of an actual or impending law suit." *Id.* at 76.

Nor is there any language in Rule 24 that provides an exception to the requirement that a motion for leave to intervene "shall" be accompanied by a pleading setting forth a claim or defense. The existence of these requirements is undisputable as is the fact that Rule 24 contains nothing that would allow a party who filed no pleading and asserted no claim or defense to intervene.

The Court of Appeals bridged the gap between the language of Rule 24 and limited purpose intervention by asserting the existence of "ample support" in prior cases. App. A at A-4. The Court of Appeals referred to the series of cases allowing limited purpose intervention, but it pointed to no explanation in any of those cases of a basis for such a procedure in the language of Rule 24.[4] None of the cases cited by the Court of Appeals contains any indication that the important questions presented here were ever argued by any party.[5] The issues were overlooked by the parties and the courts in virtually every reported case. The only other cases that have considered the arguments made here are several district court cases that have rejected limited purpose intervention. *See New York News Inc.*

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v. *Charles*, however, the pleading requirement is a substantive component of the Rule directly related to the fact that intervention is available only to a party seeking to litigate a claim or defense. 476 U.S. at 76-77.

[4] The Court of Appeals noted that International was one of the parties in *United Nuclear Corp.* v. *Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 799 (1991). *United Nuclear* did not involve the issues raised in this case, and there is no suggestion that the Tenth Circuit identified any textual support for limited purpose intervention in Rule 24.

[5] A good example is the Ninth Circuit opinion in *Olympic Refining Co.* v. *Carter*, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964), on which the Court of Appeals did not rely for its Rule 24 analysis in this case. "Olympic intervened without objection" in connection with a motion that would have been heard anyway because it was made by one of the parties. *Id.* at 262. As Professor Moore notes, the right to object to improper intervention is a right that can be, and in *Olympic* apparently was, waived. 3B James W. Moore & John E. Kennedy, Moore's Federal Practice ¶ 24.12 at 24-116 (2d ed. 1992).

v. *Newspaper & Mail Deliverers' Union*, 139 F.R.D. 291, 293 (S.D.N.Y. 1991) ("the Federal Rules do not anticipate limited, 'special status' intervenors"); *Kamerman* v. *Steinberg*, 681 F. Supp. 206, 211 (S.D.N.Y. 1988) (Rule 24(c) requires intervention by a plaintiff or defendant with a claim or defense and does not allow "special status" intervention for the purpose of pressing a motion to stay); *Cunningham* v. *Rolfe*, 131 F.R.D. 587, 590 (D. Kan. 1990) (holding that the scope of permissive intervention does not include intervention solely for the purpose of modifying a protective order).[6]

B. The Ninth Circuit's Application Of Rule 24(b) Is Not Supported By Any Purpose Of The Rule.

In the "rare and exceptional circumstances" when an intent other than that expressed in the words of an enactment is important, that intent must be "clearly expressed." *Ardestani* v. *INS*, ___ U.S. ___, 112 S. Ct. 515, 520 (1991) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). No intent to implement any purpose other than the facilitation of adjudication of related claims or defenses in a single forum is apparent in the language or history of Rule 24. No court has ever pointed to any evidence of any such intent, and the available historical materials show that the "purpose" of the Rule is entirely consistent with its language.

The Advisory Committee Note to the 1937 adoption of Rule 24 refers generally to a 1936 article on federal intervention by Professor Moore and future Attorney General Levi. James W. Moore & Edward H. Levi, *Federal Intervention: I. The Right to Intervene and Reorganization*, 45 Yale L.J. 565 (1936) [hereinafter Moore and Levi]. This article begins with the basic proposition that illustrates the error of the Court of Appeals.

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[6] The problems that can result from the existence of a series of appellate decisions that do not address the language of Rule 24 are obvious. Already, one district court has explicitly based a Rule 24 decision on "the standard developed by the case law," rather than on the language of Rule 24. *See Kerasotes Michigan Theatres, Inc.* v. *Nat'l Amusements, Inc.*, 139 F.R.D. 102, 105 (E.D. Mich. 1991) (allowed intervention under Rule 24(b) for the purpose of modifying a protective order, citing decisions of the Sixth and Tenth Circuits).

> Intervention may be defined as the procedural device whereby a stranger can present a claim or defense in a pending action or in a proceeding incidental thereto, and become a party for the purpose of the claim or defense presented.

Id. at 565 & n.1 (quoting California Code of Civil Procedure § 387 which, in 1936 and now, states that "[a]n intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons"). From the beginning, the purpose of Rule 24 has been to allow adjudication of related claims or defenses in a single proceeding and nothing more. 3B James W. Moore & John E. Kennedy, Moore's Federal Practice, ¶ 24.05 at 24-19 (2d ed. 1992); Moore and Levi at 607 ("The discretionary right to intervene is a corollary of the permissive joinder, class suit, bill of peace with multiple parties, joint hearing and consolidation statutes and rules predicated upon the theory that when claims and defenses have a question of law or fact common to each other a sound administrative scheme of procedure should encourage one action or hearing rather than a multiplicity of actions."). *See also Cunningham* v. *Rolfe*, 131 F.R.D. 587, 590 (D. Kan. 1990). No other procedure is indicated by the language of the Rule, and no other purpose is present in its history.[7]

Respondents are wrong, in any event, to suggest that it would be appropriate to allow a general purpose such as the interest in discovery efficiency to override the specific limitations and requirements of Rule 24. Putting aside the fact that indiscriminate collection of discovery materials from prior cases can be wasteful, duplicative, and burdensome as often as it can be efficient in any sense, general laudatory goals are not a substitute for the requirements of the law.[8] If respondents seek to attain a legitimate goal,

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[7] Limited purpose intervention appears to have its origin in *Olympic Refining Co.* v. *Carter*, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964). There was no discussion of Rule 24 or limited purpose intervention and no objection to intervention in that case. *See* n.5, *supra*.

[8] In their motion for leave to intervene, respondents made no claim or representation that the *Beckman* discovery materials they sought were unique or

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they should do so in a manner authorized by law according to appropriate procedure. None of the true goals of the Federal Rules is served by treating the Rules as inconvenient formalities to be ignored whenever they get in the way of the attainment of an assertedly greater good.

II.

THE NINTH CIRCUIT'S CONCLUSION THAT NO INDEPENDENT BASIS FOR FEDERAL JURISDICTION IS REQUIRED FOR LIMITED PURPOSE INTERVENTION IS IN CONFLICT WITH THE DECISIONS OF VARIOUS COURTS OF APPEALS AND IS INCONSISTENT WITH FEDERAL RULE OF CIVIL PROCEDURE 82.

Federal courts are courts of limited jurisdiction and jealously guard against expansion of the matters cognizable before them. *E.g.*, *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951). Consistent with this fundamental principle, the Courts of Appeals that have considered the issue have unanimously concluded that Rule 24(b) permissive intervention must be supported by an independent basis for federal jurisdiction. Prior Ninth Circuit cases had followed this rule. Those cases recognized that the requirement of an independent jurisdictional basis follows from Federal Rule of Civil Procedure 82, which provides that the Federal Rules cannot be "construed to extend or limit the jurisdiction of the United States district courts." In this case, which involves only a Rule 24(b) request for permissive intervention, the Court of Appeals concluded that respondents' admitted failure to attempt a jurisdictional showing was not fatal. The court's conclusion is in conflict with its own prior decisions and those of other Courts of Appeals, and is inconsistent with Rule 82.

The Ninth Circuit acknowledged in its opinion that "[p]ermissive intervention ordinarily requires independent jurisdictional grounds," citing 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1917 at 466 (2nd ed.

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unusually significant. Indeed, the motion made it clear that respondents were simply on a fishing expedition. *E.g.*, ER 37.

1986) and *Blake* v. *Pallan*, 554 F.2d 947, 955-56 (9th Cir. 1977). App. A at A-5. This view is shared by the First, Third, Fifth, Seventh and Eighth Circuits, all of the other Circuits that have considered the issue. *See Int'l Paper Co.* v. *Town of Jay, Maine*, 887 F.2d 338, 345-46 (1st Cir. 1989); *EEOC* v. *Nevada Resort Ass'n*, 792 F.2d 882, 886 (9th Cir. 1986) (following *Blake*); *Harris* v. *Amoco Production Co.*, 768 F.2d 669, 675 (5th Cir. 1985) ("It is well-established . . . that a party must have 'independent jurisdictional grounds' to intervene permissively under Rule 24(b)."), *cert. denied*, 475 U.S. 1011 (1986); *Reedsburg Bank* v. *Apollo*, 508 F.2d 995, 1000 (7th Cir. 1975) (acknowledging general rule that permissive intervention in an in personam action must be supported by independent grounds of jurisdiction); *Beach* v. *KDI Corp.*, 490 F.2d 1312, 1319 (3d Cir. 1974) (quoting *Babcock & Wilcox*, *infra*); *Babcock & Wilcox Co.* v. *Parsons Corp.*, 430 F.2d 531, 540 (8th Cir. 1970) ("If the intervention is a permissive one the claim must be supported by independent jurisdictional grounds.").

Although it acknowledged the rule requiring an independent jurisdictional basis, the Ninth Circuit concluded that in this case "an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits." App. A at A-5. This is no answer to the jurisdictional issue for at least two reasons. First, the Court of Appeals' exception to the jurisdictional requirement is premised on the existence of two types of permissive intervention, one involving litigation of a claim or defense according to the terms of Rule 24 and the other somehow not subject to the requirements of the Rule. No second type of permissive intervention is authorized by Rule 24.

Second, as explained by the Ninth Circuit in prior cases, permissive intervention must be founded upon an independent basis for jurisdiction because

> While Rule 24 itself does not mention any jurisdictional requisite, that cannot end the inquiry as Rule 82 specifically provides that the Federal Rule [sic] of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."

Blake v. *Pallan*, 554 F.2d 947, 956 (9th Cir. 1977). *See also EEOC* v. *Nevada Resort Ass'n*, 792 F.2d 882, 886 (9th Cir. 1986). Contrary to what the Court of Appeals said below, no matter how a permissive intervenor finds its way within Rule 24, Rule 82 requires that an independent basis for federal jurisdiction be established.

The First Circuit has also specifically recognized "that Rule 24(b) cannot break down *jurisdictional* barriers to intervention" in light of Rule 82. *Int'l Paper Co.* v. *Town of Jay, Maine*, 887 F.2d 338, 346 (1st. Cir. 1989) (emphasis in original). The Ninth Circuit's conclusion that Rule 24(b) provides an entree to federal court without a jurisdictional showing under any circumstances is inconsistent with *Int'l Paper* and Rule 82. Regardless of whether they sought to litigate a claim or defense, obtain modification of a protective order, or do anything else, respondents were in the district court solely because of Rule 24(b). No matter how the Rule is interpreted, it cannot be used to allow a district court to acquire jurisdiction it does not otherwise have. *See also Lesnik* v. *Public Indus. Corp.*, 144 F.2d 968, 973 (2d Cir. 1944); 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1917, at 459-60 (2d ed. 1986). The conflict between *Int'l Paper* and the opinion below provides further reason for granting certiorari.

The Ninth Circuit apparently also concluded that the district court had jurisdiction because it "retained the power to modify the protective order." App. A at A-5. This analysis misses the point because it essentially overlooks the fact that respondents filed a motion for leave to intervene, not simply a motion to modify the protective order.[9] Although the Court of Appeals recognized in the

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[9] As non-parties, respondents had no standing to seek modification of the protective order, a point they acknowledged by filing a motion for leave to intervene. The Court of Appeals stated that "[respondents did] not . . . seek to become parties to the action," App. A at A-6, but that is precisely what they did by filing a motion for leave to intervene. *See, e.g., Karcher* v. *May*, 484 U.S. 72, 77 (1987); *Schneider* v. *Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985). *See generally* 3B James W. Moore, Moore's Federal Practice, ¶ 24.02 at 24-13 (1987); Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 897 (1958); Moore and Levi at 565 & n.1.

first sentence of its opinion that respondents had sought to "(1) intervene under Fed. R. Civ. P. 24(b) and (2) modify a protective order," App. A at A-2, the Court's consideration of the jurisdictional issue referred only to modification of the protective order. The real question, the one the Court did not address, was whether an independent jurisdictional basis was required for intervention under Rule 24(b). The district court had the power to modify the protective order, but that power did not confer any authority to allow respondents to intervene.[10] The issue is whether respondents could become parties to the action through Rule 24 and invoke the court's power themselves. The cases and Rule 82 make it clear they could not.[11]

CONCLUSION

> Every so often a faulty decision by one court is picked up by a second, and then by a few more, until it acquires a life of its own. In the fullness of time, however, a few brave judicial souls see the light, often without guidance from the Supreme Court or other appellate courts, and further development is set on the right course.

Louis Loss, *Commentary: The Assault on Securities Act Section 12(2)*, 105 Harv. L. Rev. 908, 908 (1992) (footnote omitted). The only judicial souls to have "seen the light" on the issues presented here are the district judges in *New York News*, *Kamerman*, and *Cunningham*. Their insights have not been enough to direct the development of the law in the right direction, however, and the faulty decisions in other cases have acquired such a life of their own that the Court of Appeals decided this case without seeking a basis for its conclusion in the language of Rule 24. Without guidance from this Court, conflict will remain, and further development is likely to continue on the wrong course.

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[10] None of the parties to the settled lawsuit requested modification of the protective order.

[11] Discussion of the jurisdictional issue is admittedly difficult. The reason for the difficulty is that Rule 24 was never intended to apply to any situation not involving litigation of a claim or defense. If limited purpose intervention is to be pounded into the structure of Rule 24(b), however, it must satisfy the jurisdictional requirements applicable to permissive intervention.

Because the Court of Appeals' opinion cannot be reconciled with the language of Rule 24, the limiting principle of Rule 82, or the plain meaning decisions of this Court, International's petition should be granted.

Dated: July 24, 1992

Respectfully submitted,

ROBERT E. FREITAS
JON B. STREETER
KATHRYN DOI
ORRICK, HERRINGTON & SUTCLIFFE
Counsel for Petitioner

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

Beckman Industries, Inc.; Smithkline Beckman *Plaintiffs-Appellees,* and Stauffer Chemical Company, *Intervenors-Appellees,* v. International Insurance Company, *Defendant-Appellant.*	No. 90-55859 D.C. No. CV-85-8382-MRP
Beckman Industries, Inc.; Smithkline Beckman, *Plaintiffs-Appellees,* and Monsanto Company; Reichhold Limited; FMC Corporation; Bridgestone/Firestone, *Intervenors-Appellees,* v. International Insurance Company, *Defendant-Appellant.*	No. 90-55871 OPINION

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Submitted February 4, 1992*
Pasadena, California

* The members of the panel unanimously agree that this case is appropriate for submission on the briefs and record pursuant to Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

Filed June 4, 1992
Before: J. Clifford Wallace, Chief Judge, James R. Browning and Warren J. Ferguson, Circuit Judges.

Opinion by Judge Ferguson

OPINION

FERGUSON, Circuit Judge:

International Insurance Company ("International") appeals orders of the district court granting motions of the intervenors to (1) intervene under Fed. R. Civ. P. 24(b) and (2) modify a protective order to permit the intervenors access to six deposition transcripts taken in an earlier action. International contends that the intervenors failed both to satisfy the requirements for intervention and to justify modification of the protective order. We affirm.

The main action between Beckman Industries (Beckman), plaintiff, and International, defendant, was settled and dismissed in 1988. At issue was whether environmental impairment liability (EIL) insurance policies issued by International to Beckman provided coverage for certain environmental liabilities. Discovery included the depositions of six International employees involved in the development and administration of the EIL policies sold to policy holders around the country. As part of the *Beckman* action the district court, pursuant to a stipulation, issued a blanket protective order in 1986 keeping all discovery confidential.

Stauffer Chemical Company, Monsanto Company, Reichhold Limited, FMC Corporation and Bridgestone/Firestone, Inc. ("intervenors") are currently involved in litigation in state courts in which the scope of coverage of International's EIL policies is at issue. Stauffer and International are parties in two consolidated cases pending in Los Angeles County Superior Court. In April 1990 Stauffer filed a motion to intervene in the *Beckman* action for the purpose of moving to modify the protective order to gain access to the six deposition transcripts. The other intervenors filed a joint motion based on the same grounds and seeking the same relief as Stauffer. Beckman did not object to the modification, and the intervenors agreed to use the six deposition transcripts in accordance with protective orders in the pending state actions.

Intervenors claimed the six transcripts (1) will provide relevant information regarding the drafting, interpretation, underwriting and administration of the standard EIL insurance policies; (2) may contain admissions against interest as to policy interpretation; and (3) may contain inconsistent statements. The district court granted the intervenors' motions. International appeals.

I.

The underlying order is appealable either as a final order under 28 U.S.C. § 1291 or as a collateral order. *United Nuclear Corp.* v. *Cranford Insurance Co.*, 905 F.2d 1424, 1426 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 799 (1991). *See also Wilk* v. *American Medical Ass'n*, 635 F.2d 1295, 1298 (7th Cir. 1980) (appeal from modification of protective order proper under collateral order doctrine); *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 293-94 (2nd Cir. 1979) (appeal from orders granting intervenor status and modification of protective order proper under 28 U.S.C. § 1291 because no other matter pending before the court).

II.

Intervenors propose that the proper standard of review is abuse of discretion, while International urges de novo review.

We review a decision whether to grant permissive intervention under an abuse of discretion standard. *Venegas* v. *Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989), *aff'd*, 495 U.S. 82 (1990). However, the initial questions before us are legal ones, concerning the coverage and interpretation of the Federal Rules of Civil Procedure. Review is therefore de novo as to whether Rule 24(b) permits intervention for the purpose of seeking a modification of a protective order after the conclusion of the underlying action. *See United States* v. *McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc) (issues of law subject to de novo review), *cert. denied*, 469 U.S. 824 (1984).

The court reviews the grant of a protective order for abuse of discretion, *Roat* v. *C.I.R.*, 847 F.2d 1379, 1382 (9th Cir. 1988), as well as a request to modify a protective order. *United Nuclear Corp.* v. *Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990),

cert. denied, 111 S.Ct. 799 (1991); *Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

III.

Fed. R. Civ. P. 24(b)(2) allows intervention in an action "when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2).

[1] International argues that Rule 24(b) only permits intervention for the purpose of litigating a claim on the merits in a pending action, in order to dispose of related controversies together. International is correct that the primary focus of Rule 24(b) is intervention for the purpose of litigating a claim on the merits. Nevertheless, there is ample support for intervenor's argument that courts also recognize Rule 24(b) intervention as a proper method to modify a protective order. *See Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 783-784 (1st Cir. 1988) (Rule 24 is correct course for third parties to challenge protective orders), *cert. denied*, 488 U.S. 1030 (1989); *Meyer Goldberg, Inc. of Lorain* v. *Fisher Foods*, 823 F.2d 159, 162 (6th Cir. 1987) (recognizing 24(b) intervention as proper method for nonparty to seek protected materials); *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979) (intervention under Rule 24(b) proper method for third party challenges to protective order); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979) (same).

The Tenth Circuit recently adopted this view in a case directly on point involving the same defendant, International. *United Nuclear Corp.* v. *Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 799 (1991). There, the intervenors, litigants in state and federal courts, sought determinations of the scope of coverage of policies issued by International. International had also been a defendant in an earlier action brought by United Nuclear Corporation in which a protective order had been

issued. As in this case, the intervenors sought modification of the protective order in the earlier action to get access to depositions. The Tenth Circuit found intervention proper under Rule 24(b). It found that the request was timely, there was no prejudice to the existing parties, and the interpretation of the EIL policy was a sufficient common issue between the underlying suit and the intervenors' suits. *United Nuclear*, 905 F.2d at 1427.

Thus, contrary to International's contention, there is wide approval of Rule 24(b) intervention as a method for seeking to modify a protective order. We join these circuits in recognizing that Rule 24(b) permits limited intervention for the purpose of challenging a protective order. We next address whether the requirements of Rule 24(b) intervention for the purpose of litigating a claim on the merits are applicable to the limited type of intervention at issue here.

IV.

Permissive intervention to litigate a claim on the merits under Rule 24(b) requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action. *Garza* v. *County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991). Fed. R. Civ. P. 24(c) requires that a person seeking to intervene under Rule 24 file a motion "accompanied by a pleading setting forth the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). International claims that all these requirements are applicable where, as here, limited intervention is sought, and that the intervenors failed to satisfy them.

[2] Permissive intervention ordinarily requires independent jurisdictional grounds. 7C Charles A. Wright, Arthur R. Miller, Mary K. Kane, Federal Practice and Procedure § 1917 at 466 (2nd ed. 1986); *see also Blake* v. *Pallan*, 554 F.2d 947, 955-56 (9th Cir. 1977). Here, however, an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits. The district court retained the power to modify the protective order. *United Nuclear Corp.*, 905 F.2d at 1427 (court retains power to modify protective order even if underlying suit dismissed); *Public*

Citizen, 858 F.2d at 782-83 (analogizing to power to modify an injunction, court ruled that district court retained power to modify protective order after judgment); *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145 (2nd Cir. 1987) (district court has undisputed power to modify or lift protective orders it has entered), *cert. denied*, 484 U.S. 953 (1987). *See also* 8 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2043 at 163 (Supp. 1991). Intervenors do not ask the district [sic] to rule on additional claims or seek to become parties to the action. They ask the court only to exercise that power which it already has, *i.e.*, the power to modify the protective order. For that reason, no independent jurisdictional basis is needed.

International asserts that the words "claim or defense" in Rule 24(b) refer only to the type of valid claim or defense that can be basis for intervention in an actual or impending lawsuit. This, it argues, is confirmed by the requirement in Rule 24(c)[1] that a person desiring to intervene must serve a motion accompanied by a pleading. *See Diamond* v. *Charles*, 476 U.S. 54, 76-77 (1986) (O'Connor, J., concurring). International argues that intervenors failed to identify such a claim or defense with sufficient specificity. The district court found that the importance of access to documents prepared for similar litigation involving the same parties satisfied the commonality requirement of 24(b).

[3] We agree. The issue of interpretation of the policy supplies a sufficiently strong nexus between the district court action and the state actions to satisfy the commonality requirement. Further specificity, *e.g.*, that the claim involve the same clause of the policy, or the same legal theory, is not required when intervenors are not becoming parties to the litigation. There is no reason to require such a strong nexus of fact or law when a party seeks to intervene only for the purpose of modifying a protective order. *United Nuclear Corp.*, 905 F.2d at 1427; *Meyer Goldberg, Inc.*, 823 F.2d at 164.

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[1] The relevant portion of Rule 24(c) states that "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

International further asserts that the intervenors must submit a pleading to the court describing the common issue pursuant to Fed. R. Civ. P. 24(c). International charges that intervenors' failure to submit such a pleading is fatal to their claim. It argues that the submission of a pleading is not a mere formality, but gives the court an informed basis on which to decide the motion.

[4] Courts, including this one, have approved intervention motions without a pleading where the court was otherwise apprised of the grounds for the motion. In *Shores* v. *Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943), we construed an earlier version of Rule 24 and found that although the literal terms of Rule 24 were not met, the petition fully stated the legal and factual grounds for intervention. We therefore rejected the type of technical objection International makes here.

Our decision in *Smith* v. *Pangilinan*, 651 F.2d 1320, 1325-26 (9th Cir. 1981), was similar. The intervenor had sought permission to intervene under both Fed. R. Civ. P. 24(a) and (b). The latter was referenced only in one sentence in the intervenor's motion requesting intervention of right pursuant to Rule 24(a)[2], but the court held that this one sentence was sufficient to satisfy the requirements of 24(c).[3] *Id.* at 1326. *See also Shevlin* v. *Schewe*, 809 F.2d 447, 450 (7th Cir. 1987) (applying strict interpretation of Rule 24(c) to the case at hand, but recognizing that it would not do so in all circumstances); *Spring Construction Co., Inc.* v. *Harris*, 614 F.2d 374, 377 (4th Cir. 1980) (proper approach is to disregard nonprejudicial technical defects); *Beef Industry Antitrust Litigation*, 589 F.2d 786, 788-89 (5th Cir. 1979) (discussing Fifth Circuit's lenience regarding

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[2] The concluding sentence of the intervenor's motion under Rule 24(a) stated, "[i]n any event, the Intervenor may be permitted to intervene by the court pursuant to F.R.C.P. 24(b) as the intervention will not delay or prejudice the rights of the original parties." *Smith* v. *Pangilinan*, 651 F.2d at 1326.

[3] *Spangler* v. *Pasadena City Bd. of Ed.*, 552 F.2d 1326 (9th Cir. 1977), cited by International to support strict compliance with Rule 24, is not on point. The issue was the importance of filing a motion to intervene when a person seeks to become a party. *Id.* at 1329. The court did not discuss Fed. R. Civ. P. 24(c) or the level of formal compliance that is required.

compliance with 24(c)). There is contrary authority, but in cases in which a strict attitude is taken towards procedural compliance, the court has also indicated a substantive reason why intervention should not be permitted. 7C Charles A. Wright, Arthur R. Miller, Mary K. Kane, Federal Practice and Procedure § 1914 at 415 (2d Ed. 1986).

Further support for our approach is found in *Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d at 783-84. In that case, the First Circuit discussed the mandatory language in Rule 24(c) and declined "to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion," but nevertheless recognized intervenor status where the third party had requested intervention under Rule 24(b) and the district court had implicitly granted the request. Thus, where, as here, the movant describes the basis for intervention with sufficient specificity to allow the district court to rule, its failure to submit a pleading is not grounds for reversal.

V.

International contends that even if intervention is permitted, intervenors failed to justify the order permitting modification of the protective order.[4] The district court based its ruling in favor of intervention and modification on the grounds of the importance of access to the documents, a lack of prejudice to International and the absence of extraordinary circumstances militating against intervention and modification.

International, citing Second Circuit case law, argues that intervenors should show "extraordinary circumstances" or "compelling need" before modification of the protection order is warranted. *See In re "Agent Orange" Product Liability Litig.*, 821 F.2d 139, 147 (2nd Cir.), *cert. denied*, 484 U.S. 953 (1987). *But see United Nuclear*, 905 F.2d at 1428 n. 1 (describing limits to extraordinary

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[4] For "good cause shown," the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c).

circumstances test); *Westchester Radiological* v. *Blue Cross/Blue Shield*, 138 F.R.D. 33, 36 (S.D.N.Y. 1991) (questioning whether extraordinary circumstances standard is still valid). Intervenors urge the court to retain the approach of Rule 26(c) for modification as well, *i.e.*, the party opposing modification should have the burden of showing "good cause" for continued protection.

[5] The "extraordinary circumstances" test is incompatible with our circuit's law. Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation. In *Olympic Refining Company* v. *Carter*, 332 F.2d 260, 264-65 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964), an anti-trust action, the district court had declined to modify protective orders, citing the defendants' reliance on them in providing disclosure beyond that required and in agreeing to a consent decree. *Id.* at 264. We observed that "[n]one of these circumstances, in our opinion, support the view that these orders are not subject to modification to meet the reasonable needs of other parties in other litigation." *Id.* at 264. Trials ordinarily take place in public and the purpose of federal discovery is to force full disclosure. *Id.* We held that Olympic was entitled to modification of the order and access to the information, subject to reasonable restrictions on disclosure. *Id.* at 266.

[6] The Seventh Circuit, citing *Olympic* with approval, stresses the importance of eliminating duplicative discovery. *See Wilk* v. *American Medical Ass'n*, 635 F.2d 1295, 1301 (7th Cir. 1980). Of course there is a countervailing argument: that allowing modification may slow down the initial litigation, because parties are discouraged from disclosing for fear of forced disclosure in a later action. However, legitimate interests in privacy can be protected by putting the intervenors under the same restrictions as those contained in the original protective order. *United Nuclear*, 905 F.2d at 1428. Here, intervenors already have agreed to use the information in accordance with protective orders in the state actions. International has not argued that this protection is insufficient.

A related concern is the reliance interests of the party opposing modification. The extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case. For instance, reliance

would be greater where a trade secret was involved, or where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege. *See Public Citizen*, 858 F.2d at 791.

In the instant case, the parties stipulated to a blanket protective order. Reliance will be less with a blanket order, because it is by nature overinclusive. *Public Citizen*, 858 F.2d at 790. International thus never made a particular showing of reliance with regard to the six deposition transcripts at issue here. In addition, the stipulation and stipulated order dismissing the *Beckman* action recognized that "as insurers and insureds, [the parties] share interests and fiduciary relationships which should be protected" and that the parties wished to protect business advantage and proprietary information. The state litigation concerns exactly the same relationship in the same type of action, *i.e.*, a dispute between insurer and insureds over the interpretation of EIL policies. In this situation, we see no unfair prejudice to International by allowing access to the transcripts.

[7] Further, because the protective order was a stipulated blanket order, International never had to make a "good cause" showing under Fed. R. Civ. P. 26(c) of the need for protection of the deposition transcripts in the first place. Nor does it allege specific prejudice or harm now. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3rd Cir. 1986). Thus, International has never made the showing necessary to justify continued protection of the transcripts.

Olympic controls this case. The discovery here is sought to meet the "reasonable needs of other parties in other litigation." *Olympic*, 332 F.2d at 264. International never made a "good cause" showing under Fed. R. Civ. P. 26(c) justifying initial protection of the transcripts. It did rely on the protective order in granting discovery and settling the case. However, *Olympic* held that reliance on a protective order under these circumstances could not, without more, justify refusal to modify when there is a reasonable request for disclosure. Olympic, 332 F.2d at 264. International has not provided the court with "more." The decision to modify the pro-

tective order was well within the discretionary powers of the trial court, and we affirm.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BECKMAN INDUSTRIES, INC., *et al.*, *Plaintiffs*, v. INTERNATIONAL INSURANCE COMPANY, *Defendant*.	CASE NO. CV 85-8382 MRP ORDER

The motion of policyholders Monsanto Company, Reichhold Limited, FMC Corporation, and Bridgestone/Firestone, Inc. (collectively the "Intervenors") for limited intervention for the sole purpose of obtaining relief from the Stipulated Discovery Management and Protective Order heretofore entered by this Court came on for hearing on June 4, 1990 before the Honorable Mariana R. Pfaelzer.

Federal Rule of Civil Procedure 24(b) permits intervention where, as here, an applicant has a claim or defense that shares a question of law or fact with the action in which intervention is sought. The Ninth Circuit, as well as numerous other courts, has interpreted this rule to permit intervention by a third party for the limited purpose of seeking relief from a protective order, even after an action has been resolved.

Courts consistently have held, and this Court finds, that a court that enters a protective order in an action retains jurisdiction to allow parties to intervene to seek relief from the protective order after the litigation has been resolved, either through settlement or through judgment. *See Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 785 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989) ("*Public Citizen*"); *Olympic Refining Co.* v. *Carter*, 332 F.2d 260, 265-66

(9th Cir.), *cert. denied*, 379 U.S. 900 (1964) (''*Olympic Refining*''); *Wilson* v. *American Motors Corp.*, 759 F.2d 1568, 1570-71 (11th Cir. 1985); *In Re Franklin National Bank Securities Litigation*, 92 F.R.D. 468, 471 (E.D.N.Y. 1981), *aff'd sub. nom. FDIC* v. *Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982); and *Mokhiber* v. *Davis*, 537 A.2d 1100, 1104-06 (D.C. App. 1988).

In determining the timeliness of a post-judgment motion to intervene, courts have looked to the following four factors: (1) length of time that the intervenor knew or should have known of its interest in the case before it petitioned; (2) prejudice to existing parties due to the delay in intervening; (3) prejudice that would be suffered by the intervenor if not allowed to intervene; and (4) the existence of extraordinary circumstances militating for or against intervention. *Public Citizen*, 858 F.2d at 785-87.

The Court finds that Stauffer timely made a motion to intervene in that there was no delay in making their petition to intervene once they knew of their interest in the case. There is no prejudice to the existing parties to the case, since the merits of the case have been concluded and are not themselves the subject of review.

In addition, the Court finds that the intervenors would suffer prejudice if not permitted to intervene, since no party has previously asserted their interests in having access to these depositions. Finally, there are no extraordinary circumstances militating against intervention, while the importance of access to documents prepared for similar litigation involving the same party militates for intervention.

Modification of a protective order lies within the discretion of the district court, and is here justified by the settlement and resolution of the underlying dispute. *See Public Citizen*, 858 F.2d at 790-91.

Upon consideration of this motion, the memoranda filed in support thereof and in opposition thereto, and for the reasons set forth above,

IT IS HEREBY ORDERED that:

1. The motion of Intervenors to intervene is granted.

2. The Stipulated Discovery Management and Protective Order is modified so as to authorize Intervenors to obtain access to and copies of the transcripts and all exhibits thereto, of the depositions of Conrad Owen, Michael Rogers, Charles Humpstone, Dennis Madea, Conrad Cyriax, and Robert Smith.

3. Intervenors' use of the aforementioned transcripts, and the exhibits thereto, is subject to and in accordance with the protective orders or confidentiality agreements that have been, or may be, entered in the following actions: *Monsanto Company* v. *Aetna Casualty and Surety Co., et al.*, C.A. No. 88L-JA-118 (Super Ct., New Castle Cty., Del.); *Bridgestone/Firestone, Inc.* v. *AIU Ins. Co.*, CV 89 01-0158 (Ct. of Common Pleas, Summit Cty., Oh); *FMC Corp.* v. *Liberty Mutual Ins. Co., et al.*, No. 643058 (Super. Ct. Santa Clara Cty., Cal.); *Reichhold Ltd.* v. *International Ins. Co.*, File No. R.E. 1492/87 (Sup. Ct. Ontario, Canada); *Monsanto Company* v. *Crum & Forster, Inc. et al.*, No. 89-1063 (Dist. Ct., Harrison Cty., Tx).

DATED: June 28, 1990

/s/

Mariana R. Pfaelzer
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BECKMAN INDUSTRIES, INC., *et al.*, *Plaintiffs*, v. INTERNATIONAL INSURANCE COMPANY, *Defendant*.	CASE NO. CV 85-8382 MRP ORDER

The Motion of Proposed Intervenor Stauffer Chemical Company for Leave to Intervene for the Sole and Restricted Purpose of Obtaining Limited Relief from 'Stipulated Discovery Management and Protective Order', and Request for Expedited Consideration came on for hearing on June 4, 1990 before the Honorable Mariana R. Pfaelzer.

Federal Rule of Civil Procedure 24(b) permits intervention where, as here, an applicant has a claim or defense that shares a question of law or fact with the action in which intervention is sought. The Ninth Circuit, as well as numerous other courts, has interpreted this rule to permit intervention by a third party for the limited purpose of seeking relief from a protective order, even after an action has been resolved.

Courts consistently have held, and this Court finds, that a court that enters a protective order in an action retains jurisdiction to allow parties to intervene to seek relief from the protective order after the litigation has been resolved, either through settlement or through judgment. *See Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 785 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989) (''*Public Citizen*''); *Olympic Refining Co.* v. *Carter*, 332 F.2d 260, 265-66 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964) (''*Olympic Refining*''); *Wilson* v. *American Motors Corp.*, 759 F.2d 1568, 1570-71

(11th Cir. 1985); *In Re Franklin National Bank Securities Litigation*, 92 F.R.D. 468, 471 (E.D.N.Y. 1981), *aff'd sub. nom. FDIC* v. *Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982); and *Mokhiber* v. *Davis*, 537 A.2d 1100, 1104-06 (D.C. App. 1988).

In determining the timeliness of a post-judgment motion to intervene, courts have looked to the following four factors: (1) length of time that the intervenor knew or should have known of its interest in the case before it petitioned; (2) prejudice to existing parties due to the delay in intervening; (3) prejudice that would be suffered by the intervenor if not allowed to intervene; and (4) the existence of extraordinary circumstances militating for or against intervention. *Public Citizen*, 858 F.2d at 785-87.

The Court finds that Stauffer timely made a motion to intervene in that there was no delay in making their petition to intervene once they knew of their interest in the case. There is no prejudice to the existing parties to the case, since the merits of the case have been concluded and are not themselves the subject of review.

In addition, the Court finds that the intervenors would suffer prejudice if not permitted to intervene, since no party has previously asserted their interests in having access to these depositions. Finally, there are no extraordinary circumstances militating against intervention, while the importance of access to documents prepared for similar litigation involving the same party militates for intervention.

Modification of a protective order lies within the discretion of the district court, and is here justified by the settlement and resolution of the underlying dispute. *See Public Citizen*, 858 F.2d at 790-91.

Upon consideration of the memoranda submitted, the oral arguments made, and the entire record of this case, and for the reasons set forth above,

IT IS HEREBY ORDERED that Stauffer's Motion for Leave to Intervene is granted; and

IT IS FURTHER ORDERED that the Stipulated Discovery Management and Protective Order is modified so as to authorize Stauffer to obtain, forthwith, access to and copies of the transcripts

and all exhibits thereto of the depositions of Conrad Owen, Michael Rogers, Charles Humpstone, Dennis Madea, Conrad Cyriax, and Robert Smith; and

IT IS FURTHER ORDERED that Stauffer's use of the aforementioned transcripts and exhibits is subject to and in accordance with the discovery stipulations and protective orders that have been, or may be, entered in the California action.

DATED: June 28, 1990

/s/

Mariana R. Pfaelzer
United States District Judge

APPENDIX D
FEDERAL RULES OF CIVIL PROCEDURE

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403. When the constitutionality of any statute of a State

affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of the Title 28, U.S.C. § 1391-93.

Supreme Court, U.S.
FILED
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No. 92-162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL INSURANCE COMPANY,
Petitioner,

v.

BRIDGESTONE/FIRESTONE, INC., FMC CORPORATION, MONSANTO COMPANY, REICHHOLD LIMITED, STAUFFER CHEMICAL COMPANY (now known as RHONE-POULENC BASIC CHEMICALS COMPANY),

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. Whether the Ninth Circuit's determination that a non-party seeking modification of a protective order after final judgment in order to obtain access to discovery materials may proceed by filing a motion to intervene pursuant to Federal Rule of Civil Procedure 24(b), in accord with the uniform decisions of the other circuits that have considered that issue, was an improper extension of federal jurisdiction?

LIST OF PARTIES

The Respondents involved in this appeal are Monsanto Company,[1] Reichhold Limited,[2] FMC Corporation,[3] Bridgestone/Firestone, Inc.[4], and Stauffer Chemical Company (now known as Rhone-Poulenc Basic Chemicals Company).[5]

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[1] Monsanto Company has no publicly-owned parent. Non-wholly-owned subsidiaries of Monsanto Company are: Southwall Technologies, Inc.; LTX; and Cadence Designs Systems, Inc. Further, Monsanto's wholly-owned subsidiary, Inno Ven II Corporation, holds less than a 5% common stock interest in each of the following publicly-owned companies: Dynamic Sciences International; Micro General Corporation; Xylogics Inc.; WEITEK Corporation; Hasbro, Inc.; MacNeil Schindler, Inc.; Gensia, Inc.; and GeneLabs Technology, Inc.

[2] The parent and related companies of Reichhold Limited are, respectively: Reichhold Chemicals, Inc. (parent); DIC Americas, Inc. (parent of Reichhold Chemicals, Inc.); Dionippon Ink & Chemicals, Inc. (parent of DIC Americas, Inc.) (trading on Tokyo, Osaka, Wagoya Stock Exchange).

[3] The following are non-wholly-owned subsidiaries or affiliates of FMC Corporation: FMC Gold Company (non-wholly-owned subsidiary); Ciniflex Teknowledge Corp. (affiliate). FMC Corporation also has a number of subsidiaries and affiliates located in foreign countries, a list of which will be furnished if the Court deems it necessary.

[4] The parent and non-wholly-owned subsidiaries of Bridgestone/Firestone, Inc. are, respectively: Bridgestone Corporation (parent); Firestone Stores of Bay City, Inc.; Brea, Inc.; El Toro, Inc.; Fullerton-Placentia Ave., Inc.; South Coast Plaza, Inc.; Sunnymeade, Inc.; Colorado Springs, Inc.; Englewood, Inc.; Lakewood, Inc.; Littleton, Inc.; Rustic Hill, Inc.; Villa Italia, Inc.; Orlando-Curry, Inc.; Chicago-Ford, Inc.; Riverdale, M.D., Inc.; Roseville, M.N., Inc.; Jennings, Inc.; Delta Holding, Inc. (non-wholly-owned subsidiaries). Bridgestone/Firestone, Inc. has a number of subsidiaries and affiliates located in foreign countries, a list of which will be furnished if the Court deems it necessary.

[5] The parent and non-wholly-owned subsidiaries of Rhone-Poulenc Basic Chemicals Company are, respectively: Rhone-Poulenc, Inc. (parent); Rhone-Poulenc of Wyoming Company; Rhone-Poulenc of Wyoming L.P.; Overland Trail Transmission Company L.P. (non-wholly-owned subsidiaries).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-162

INTERNATIONAL INSURANCE COMPANY,
Petitioner,

v.

BRIDGESTONE/FIRESTONE, INC., FMC CORPORATION, MONSANTO COMPANY, REICHHOLD LIMITED, STAUFFER CHEMICAL COMPANY (now known as RHONE-POULENC BASIC CHEMICALS COMPANY),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The Petitioner seeks review of a decision of the United States Court of Appeals for the Ninth Circuit which affirmed two orders of the United States District Court of the Central District of California (Pfaelzer, J.), that granted the Respondents' motions for leave (1) to intervene, and (2) to modify a protective order to grant Respondents access to six deposition transcripts and their exhibits. The action before the district court (the "*Beckman*" action) involved the issue of whether environmental impairment liability ("EIL") insurance policies sold by International Insurance Company ("Interna-

tional") to Beckman Instruments, Inc. ("Beckman") provided coverage to Beckman for certain environmental liabilities.

On June 23, 1986, the district court entered a "Stipulated Discovery Management and Protective Order" (the "Protective Order") which, among other things, provided that the discovery in the action would be kept confidential. The discovery taken in the action included depositions of six individuals responsible for the development, sale, and claims handling of the standard-form EIL insurance policies sold by International to policyholders throughout the United States, including the Respondents. The *Beckman* action was dismissed by stipulation, pursuant to a settlement, in May 1988.

Each of the Respondents now has pending litigation against International concerning the scope of coverage provided by one or more EIL policies sold to it by International.[6] Each of the Respondents' coverage actions raises the same issues presented in this case concerning the meaning of the standard-form policy language contained in EIL insurance policies sold by International.

On April 25, 1990, the Respondents moved to intervene in this action for the sole purpose of seeking modification of the Protective Order, to enable them to obtain the six EIL deposition transcripts, including exhibits. The Respondents believe that those transcripts will provide highly relevant information relating to either Interna-

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[6] The Respondents' actions are: *Montrose Chemical Co. v. Canadian Universal Co., Inc.* (Case No. C 594 148) (consolidated with *Stauffer Chemical Co. v. American Motorists Ins. Co.*, No. C 597 389 (Super. Ct., Los Angeles Cty., Cal.); *Monsanto Co. v. Aetna Casualty and Surety Co.*, No. 88L-JA-118 (Super. Ct., New Castle Cty., Del.); *Bridgestone/Firestone, Inc. v. AIU Insurance Co.*, 89 01-0158 (Ct. of Common Pleas, Summit Cty., Oh.); *FMC Corp. v. Liberty Mut. Ins. Co.*, No. 643058 (Super. Ct., Santa Clara Cty., Cal.); *Reichhold Ltd. v. International Insurance Co.*, No. R.E. 1492/87 (Sup. Ct., Ontario, Canada).

tional's or its agents' drafting, interpretation, underwriting, and administration of the standard-form EIL insurance policies. Additionally, the transcripts may provide admissions against interest and statements that are inconsistent with statements made or positions taken by International in the Respondents' coverage actions.[7]

On June 29, 1990, after briefing and a hearing, the district court granted the Respondents' motions to intervene and to modify the Protective Order. The district cour found ample and consistent precedent for permitting limited intervention to seek relief from a protective order so that discovery may be used in a similar action. The district court found that: (a) the Respondents' motions were timely; (b) there were no extraordinary circumstances militating against intervention; and (c) "the importance of access to documents prepared for similar litigation involving the same party militates for intervention." (Appendices B and C, at B-2, C-2.)

International appealed the district court's orders to the United States Court of Appeals for the Ninth Circuit, and sought a stay of the orders pending appeal. The Ninth Circuit denied International's motion for a stay and, in a decision dated June 4, 1992, affirmed the orders of the district court. (Appendix A.)

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[7] After the district court granted their motions to intervene and to modify the Protective Order, some of the Respondents obtained certain of the EIL deposition transcripts. They have not been able to locate all of the transcripts, however, nor have they obtained any of the deposition exhibits.

REASONS FOR DENYING THE WRIT

As Petitioner has acknowledged, the Ninth Circuit's decision is consistent with the decisions of all other circuit courts that have considered whether intervention should be permitted for the limited purpose of seeking modification of a protective order governing discovery, and without filing a pleading or asserting an independent basis for federal jurisdiction. Thus, the Ninth Circuit's decision does not raise any conflict between the circuits, and the petition should be denied.

Further, Petitioner errs when it asserts that the Ninth Circuit's decision conflicts with the decisions of this Court that have construed a rule or statute consistent with its plain meaning. No decision of this Court has required strict adherence to a technical requirement of a Federal Rule of Civil Procedure in circumstances where such adherence would increase, rather than decrease, the burden of litigation on the affected parties and thus be contrary to the overriding goal of the Rules, set forth in Rule 1, "to secure the just, speedy, and inexpensive determination of every action." Therefore, there is no cause for this Court to exercise its certiorari jurisdiction, and the Petition should be denied.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS CONCERNING THE USE OF RULE 24(b) TO PERMIT LIMITED INTERVENTION FOR THE SOLE PURPOSE OF MODIFYING A DISCOVERY PROTECTIVE ORDER AND WITHOUT FILING A PLEADING OR ASSERTING AN INDEPENDENT BASIS FOR FEDERAL JURISDICTION

Petitioner concedes (Petition at 5) that there is no conflict among the Circuit Courts of Appeals that Rule 24(b) allows intervention for the limited purpose of seeking relief from a discovery protective order. Thus, the Ninth Circuit's decision is consistent with a line of

decisions from the Circuit Courts of Appeals that, consistent with Fed. R. Civ. P. 1, have construed Rule 24(b) to "secure the just, speedy, and inexpensive determination of every action," by allowing a litigant to gain access to relevant discovery material that may significantly reduce the expense of its own action and aid in the resolution of that action. (Appendix A at A-4, citing decisions from the First, Second, Fifth, Sixth and Tenth United States Circuit Courts of Appeals.)

This Court previously has declined to review all of the Circuit Court decisions addressing this issue in which certiorari was sought. *Id.* Indeed, just last year, this Court denied a request by the Petitioner in this case to review a Tenth Circuit decision that reached the same result, in virtually identical circumstances, as the Ninth Circuit reached below. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991) ("*United Nuclear*").

A. The Ninth Circuit's Decision Does Not Conflict with Any Decisions of This Court

Petitioner's sole argument is that the "plain meaning" of Rule 24(b) supposedly does not permit intervention for the limited purpose of seeking modification of a protective order. Petitioner contends that a literal adherence to Rule 24(b) permits intervention only where a party seeks to litigate a "claim or defense" within the action, and has filed a pleading setting forth that claim or defense.[8] Petitioner thus asserts that the Ninth Circuit's decision, and the consistent decisions of the other Circuit Courts that the Ninth Circuit followed, purport-

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[8] Fed. R. Civ. P. 24(b) allows a person to intervene when his "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(c) states that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

edly conflict with this Court's decisions applying the "plain meaning" rule. (Petition at 6-9.)

Petitioner's argument, itself, however, fails to recognize the plain meaning of Rule 1. That rule states that all of the Federal Rules of Civil Procedure, including Rule 24(b), "shall be construed to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. This Court has relied on Rule 1 in rejecting an overly technical construction of the Rules. *See, e.g., Foman v. Davis*, 371 U.S. 178, 181-82 (1962) ("*Foman*"). In *Foman*, this Court held that "it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities . . . . The Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1." *Id.*

The Ninth Circuit's construction of Rule 24(b), to permit limited intervention for purposes of modifying a discovery protective order, accords with the mandate of Rule 1. Further, the Ninth Circuit's decision is not inconsistent with this Court's decisions applying the plain meaning of a rule or statute. Those decisions do not require strict adherence to a technical requirement in circumstances, such as those here, where requiring strict adherence would make no sense. Indeed, this Court has held, consistent with common sense, that

> the courts, in interpreting a statute, have some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute."

Commissioner v. Brown, 380 U.S. 563, 571 (1965), quoting *Helvering v. Hamnel*, 311 U.S. 504, 510-11, 61 S. Ct. 368 (1941). Even in one of the cases cited by Petitioner, *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, —— U.S. ——, 111 S. Ct. 922, 928, 930

(1991) (Petition at 6), where this Court cited the "plain meaning" rule in construing Rule 11, the Court also supported its decision by reference to common sense.[9]

Further, in *Cooter & Gell*, *supra*, the Court upheld the authority of the district courts to consider collateral issues related to their jurisdiction over an action, even after the action has been resolved. 110 S. Ct. at 2455. A motion for limited intervention for purposes of seeking relief from a protective order is simply another example of such a collateral issue related to a district court's continuing jurisdiction, which the district court should be permitted to resolve.

B. The Ninth Circuit's Application of Rule 24(b) Is Consistent with the Overriding Goal of the Federal Rules of Civil Procedure

In accord with the plain meaning of Rule 1, Rule 24 should be construed with reference to its underlying purpose of streamlining litigation. In circumstances where limited intervention is sought only to modify an existing order, as to which the district court has continuing jurisdiction, no purpose would be served by requiring a pleading asserting an intervenor's independent claim against any party. Further, because no independent claim is being made, there is no need to assert an independent basis for federal jurisdiction.

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[9] Two of the other "plain meaning" decisions cited by Petitioner also address enforcement of Rule 11. This Court has strictly enforced Rule 11 because the rule was designed to curb litigation abuse and ensure the just, speedy, and inexpensive determination of every action. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 2454 (1990) ("*Cooter & Gell*"). In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989), the Court held that Rule 11 does not permit the award of sanctions against a law firm, but only against an individual attorney who signed a pleading.

1. *The Ninth Circuit Correctly Determined That No Purpose Would Be Served by Requiring a Pleading When Intervention Is Sought for the Limited Purpose of Seeking Modification of a Protective Order*

The purpose of Rule 24(c)'s requirement that an intervenor file a pleading is to enable the court to determine whether the district court has jurisdiction over the matter as to which permissive intervention is sought. *E.g.*, *Miami County Nat'l Bank of Paola, Kan. v. Bancroft*, 121 F.2d 921, 926 (10th Cir. 1941). A further purpose is to place the other parties on notice of the relief sought by the intervenor and the grounds asserted for relief. *Spring Constr. Co., Inc. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) ("*Spring Construction*"); *WJA Realty Ltd. Partnership v. Nelson*, 708 F. Supp. 1268, 1272 (S.D. Fla. 1989) ("*WJA Realty*"). Respondents' motion papers clearly indicated not only the factual basis for their motions to intervene and their interest in the action, but also the limited scope of their requested relief. Thus, their motion papers satisfied the purpose of the Fed. R. Civ. P. 24(c) pleading provision.

Judicial interpretation of the Rule 24(c) pleading requirement has been liberal. As the Ninth Circuit stated, "[c]ourts, including this one, have approved intervention motions without a pleading where the Court was otherwise apprised of the grounds for the motion." (Appendix A at A-7). The court further stated that it previously had "rejected the type of technical objection International makes here." *Id.*, citing *Shores v. Hendy Realization*, 133 F.2d 738, 742 (9th Cir. 1943); *Smith v. Pangilinan*, 651 F.2d 1320, 1325-26 (9th Cir. 1981). Accord *Spring Construction*, 614 F.2d at 377 (proper approach is to disregard non-prejudicial defects); *WJA Realty*, 708 F. Supp. at 1272. *See generally* 3B Moore's Federal Practice, 24.14 (2d ed. 1990).

Further, the other Circuit Courts that have addressed limited intervention for obtaining discovery also have not

required rigid adherence to the Rule 24(c) pleading requirement or have dispensed with it as a mere technicality that has no meaning in that context. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 784 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 293 (2d Cir. 1979); *In re Beef Industry Antitrust Lit.*, 589 F.2d 786, 789 (5th Cir. 1979).

Petitioner is wrong to suggest that courts granting intervention to modify a protective order have done so without consideration of the purpose behind the Federal Rules. (Petition at 9-11). In *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1981), for example, the court held that:

> Rule 1 of the Federal Rules requires the Rules to be construed "to secure the just, speedy, and inexpensive determination of every action". We therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

See also Meyer Goldberg, Inc. of Lorain v. Fisher Foods, Inc., 823 F.2d 159, 164 (6th Cir. 1987).

Petitioner further errs in relying on Justice O'Connor's separate opinion in *Diamond v. Charles*, 476 U.S. 54, 75-76 (1986) (O'Connor, J., concurring in part and concurring in the judgment). That case addressed a private physician's attempt to become an active party to the litigation, by intervening to defend the validity of a state abortion statute—not a non-party seeking intervention in order to gain access to pretrial discovery materials for use in a similar action. Even there, however, Justice O'Connor acknowledged that "permissive intervention

'plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation . . . .' " *Id.* at 77 (citation omitted).

Petitioner also relies on three district court decisions that did not allow intervention under Rule 24(b). In *New York News v. Newspaper & Mail Deliverers' Union*, 139 F.R.D. 291, 292, 293 (S.D.N.Y. 1991), however, the court denied a motion for limited permissive intervention under Rule 24(b), because it "would cause delay and prejudice the parties." The court explicitly stated that the failure to file a pleading as required by Rule 24(c) was not sufficient to defeat a motion to intervene. *Id.* at 293. Further, the court acknowledged that the proposed intervenor's claim had a question of fact in common with the action before the court. *Id.*

In *Kamerman v. Steinberg*, 681 F. Supp. 206, 211, 212 (S.D.N.Y. 1988) ("*Kamerman*"), the court held that the would be intervenor's purpose—to delay the federal court action—was sufficient reason to deny leave to intervene under Rule 24(b). Thus *Kamerman* does not indicate that limited intervention is impermissible under Rule 24.

Finally, in *Cunningham v. Rolfe*, 131 F.R.D. 587, 590 (D. Kan. 1990), although the court found that a motion to intervene solely to modify a protective order governing discovery was not "contemplated by the rule allowing permissive intervention," it did not discuss the numerous Circuit Court decisions permitting intervention. Further, the court justified its denial with a host of other reasons, including the untimeliness of the motion and prejudice to the parties. *Id.* at 590-91.[10]

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[10] To the extent the *Cunningham* court's decision is based upon an interpretation of Rule 24, rather than on the court's discretion, it is inconsistent with the controlling precedent in its Circuit, *United Nuclear*, 905 F.2d 1424.

2. *The Ninth Circuit Correctly Determined That No Independent Basis for Federal Jurisdiction Need Be Asserted Where an Intervenor Does Not Seek To Litigate a Claim or Defense on the Merits*

Petitioner asserts that the Ninth Circuit's decision allowing Respondents to intervene without asserting an independent basis of federal jurisdiction, even though they did not seek to litigate a claim on the merits, conflicts with various decisions from other Circuits. No such conflict exists. In all of the Circuit Court cases relied on by Petitioner (Petition at 12-13), the intervenor sought to become involved in the merits of the underlying litigation, as opposed to seeking access to discovery.

The Ninth Circuit concluded that "an independent jurisdictional basis is not required because intervenors do not seek to litigate a claim on the merits. The district court retained the power to modify the protective order." (Appendix A at A-5). The court further stated that the Respondents "ask the court only to exercise that power which it already has, *i.e.*, the power to modify the protective order. For that reason, no independent jurisdictional basis is needed." *Id.* The court cited the following other Circuit Court decisions addressing a motion to intervene to seek modification of a protective order, for support: *United Nuclear*, 905 F.2d at 1427; *Public Citizen*, 858 F.2d at 782-83; *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987). None of those decisions required the intervenor to establish an independent basis for federal jurisdiction before it could seek modification of a protective order.

Given the absence of any conflict among the Circuit Courts, and the harmony between the decision below and the purposes of Rule 24, construed in accordance with Rule 1, this Court should deny the Petition.

CONCLUSION

In this case, the district court correctly determined that permissive intervention pursuant to Fed. R. Civ. P. 24(b) is the proper method by which a non-party may seek modification of a protective order. The Ninth Circuit's affirmance of that decision accords with decisions of the other Circuit Courts that have addressed the issue, and is not in conflict with any decisions of this Court. Therefore, the Court should deny the Petition.

Respectfully submitted,

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August 28, 1992